BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

NANCY J. REUSCH	)	
Claimant	)	
VS.	)	
	)	Docket Nos. 242,917 & 253,396
WALMART	)	
Respondent	)	
AND	)	
	)	
INSURANCE CO. STATE OF PENNSYLVANIA	)	
Insurance Carrier	)	

ORDER

Claimant appeals from the May 18, 2001, Award entered by Administrative Law Judge Brad E. Avery. The Appeals Board heard oral argument on November 13, 2001.

APPEARANCES

Timothy G. Riling of Lawrence, Kansas, appeared for claimant. H. Wayne Powers of Overland Park, Kansas, appeared for respondent and its insurance company.

RECORD AND STIPULATIONS

The Appeals Board (Board) considered the record and adopts the stipulations listed in the Award, except for stipulation number one in Docket No. 242,917. The parties stipulated at the Regular Hearing that claimant suffered personal injury by accident on January 12, 1999, not October 1, 1999. In addition, during oral argument to the Board the parties agreed that claimant's average weekly wage for Docket No. 253,396 should be determined by utilizing the wage statement marked Respondent's Exhibit A to the February 6, 2001, Regular Hearing transcript. Neither party, however, was prepared to say what claimant's average weekly wage was or what that wage statement would show.[1] Nevertheless, the parties did agree that whatever average weekly wage was reflected by the wage statement, regardless of whether or not that wage statement corresponded with the date of accident, should control the determination of claimant's average weekly wage for Docket No. 253,396. Finally, the parties stipulated that the ending date for the series of accidents alleged in Docket No. 253,396 should be the ending date of the wage statement, December 15, 2000, and not the February 15, 2000 date of accident found by the ALJ in the Award.

[1] The Board finds it unacceptable that despite the fact that claimant's average weekly wage has been an issue throughout the litigation of these claims, neither claimant's nor respondent's counsel could state what average weekly wage they were alleging. *See* K.A.R. 51-3-8.

ISSUES

The ALJ denied all benefits in Docket No. 242,917 finding claimant's accident did not occur in the course of claimant's employment with respondent. The issues for the Board's review in Docket No. 242,917 are whether claimant's accidental injuries arose out of and in the course of her employment with respondent and, if so, the nature and extent of claimant's disability, claimant's average weekly wage and claimant's entitlement for medical treatment expenses, authorized, unauthorized and future.

In Docket No. 253,396 the ALJ awarded claimant permanent partial disability compensation based upon a 10 percent scheduled injury to the right upper extremity (at the level of the arm). Claimant alleges she is entitled to a general body disability for bilateral upper extremity injuries. To the extent described in the above stipulations, claimant's average weekly wage is likewise an issue in Docket No. 253,396.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Docket # 242,917

On January 12, 1999, claimant was employed by the respondent as a cashier at a Walmart in Lawrence, Kansas. After completing her regular work shift and clocking out, claimant left the store and walked to her car which was parked in the store parking lot. But before leaving the parking lot claimant first drove her car to the automotive area of the store to have one of the workers there show her how to put deicer in her car. As one of the automotive technicians was assisting claimant he let go of the car hood which fell striking claimant on her head, neck, and shoulder.

Claimant argues her injuries are compensable because the accident occurred on the premises of her employer. Respondent disagrees and argues that the accident did not arise out of claimant's employment.

Accidents occurring while employees are on their way to or from work are generally not compensable. But accidents that occur either on an employer's premises or on the only available route to work may be compensable depending upon the facts.

> The words "arising out of and in the course of employment" as used in the workers compensation act shall not be construed to include injuries to the employee occurring while the employee is on the way to assume the duties of employment or after leaving such duties, the proximate cause of which injury is not the employer's negligence. **An employee shall not be construed as** being on the way to assume the duties of employment or **having left such duties at a time when the worker is on the premises of**

> **the employer** or **on the only available route to or from work which is a route involving a special risk or hazard** and **which is a route not used by the public except in dealings with the employer.**[2] (Emphasis added.)

The above statute is a codification of Kansas' "going and coming" rule.[3] The statute permits two exceptions to that rule - a "premises" exception and a "special hazards" exception.[4]

Before the "special hazard" exception will apply, the accident (1) must occur on the only route available to or from work, (2) the route must possess a special risk or hazard, and (3) the route must be used by the public, if at all, only to deal with the employer. The claimant must prove all three elements.[5] In this case claimant is not alleging that there was a special risk or hazard or that this exception otherwise applies. What claimant does allege is that the premises exception to the going and coming rule is applicable and makes this claim compensable.

Kansas narrowly construes "premises" to be a place either controlled by the employer or where a worker may reasonably be when performing his or her job duties.[6]

In the instant case claimant's accidental injury occurred after she had departed from the work for which she was employed.[7] Furthermore, claimant had deviated from the route she would normally have taken if she were leaving the premises after work.[8] Accordingly, as claimant's accidental injury occurred after she had departed from the work for which she was employed and while she was engaged in a personal errand unrelated to her employment, it did not occur in the course of her employment and it did not arise out of her employment. The ALJ's denial of benefits should therefore be affirmed.

Docket No. 253,396

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[2] *See* K.S.A. 44-508(f)

[3] *See* Madison v. Key Work Clothes, 182 Kan. 186, 318 P.2d 991 (1957).

[4] Thompson v. Law Offices of Alan Joseph, 256 Kan. 36, 883 P.2d 768 (1994).

[5] Chapman v. Beech Aircraft Corp., 258 Kan. 653, 907 P.2d 828 (1995).

[6] Thompson Syl. ¶1.

[7] *See* Bailey v. Mosby Hotel Co., 160 Kan. 258, 267, 160 P.2d 701 (1945).

[8] *See* .Kindel v. Ferco Rental, Inc., 258 Kan. 272, 899 P.2d 1058 (1995); Angleton v. Starkan, Inc. 250 Kan. 711, 828 P.2d 933 (1992)..

The Board finds that claimant's repetitive activities at work caused permanent injury to both her upper extremities by a series of accidents through December 15, 2000. The Board specifically finds that it was those repetitive work activities and not the January 12, 1999, falling car hood incident that caused claimant's carpal tunnel syndrome in her left upper extremity.

Three physicians provided bilateral upper extremity ratings. Orthopedic surgeon David J. Clymer, M.D. saw claimant on June 9, 1999, at the request of respondent and its insurance carrier. Dr. Clymer rated claimant's left upper extremity at 5 percent and the right upper extremity at 3 percent for a combined 5 percent permanent impairment to the body as a whole as a result of the claimant's bilateral carpal tunnel syndrome condition.

Board certified orthopedic surgeon Edward J. Prostic, M.D. saw claimant on July 13, 2000, at the request of her attorney. For the bilateral carpal tunnel syndrome condition Dr. Prostic rated claimant's functional impairment as 12 percent for each upper extremity or 23 percent to the body as a whole.

A court-ordered independent medical evaluation was performed by Dr. Peter V. Bieri on October 25, 2000. He rated claimant's impairment at 10 percent to each upper extremity for residuals of entrapment neuropathy which translates to a 6 percent whole body impairment.

The Board finds all three expert medical opinions to be credible. Each opinion was given in accordance with the Fourth Edition of the AMA Guides to the Evaluation of Permanent Impairment. Accordingly, giving approximately equal weight to each opinion, the Board finds claimant's permanent impairment is 13 percent to the body as a whole.

Finally, the Board finds claimant's gross average weekly wage as a part-time employee calculated pursuant to K.S.A. 44-511(b)(5) for the 26 week period ending December 15, 2000, was $208.53.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge Brad E. Avery dated May 18, 2001,should be, and is hereby, affirmed as to Docket No. 242,917 and benefits are denied, but the Award should be and is hereby modified as to Docket No. 253,396 to a general body disability based on a 13 percent impairment, a December 15, 2000, date of accident and an average weekly wage of $208.53.

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN DOCKET NO. 253,396 IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, and against the respondent, and its insurance carrier, for an accidental injury which occurred on December 15, 2000, and based upon an average weekly wage of

$208.53 for 54 weeks of permanent partial disability compensation at the rate of $139.03 per week or $7,507.62 for a 13% permanent partial general disability.

As of December 14, 2001,there is due and owing claimant 52 weeks of permanent partial disability compensation at the rate of $139.03 per week in the sum of $7,229.56, which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of $278.06 is to be paid for 2 weeks at the rate of $139.03 per week, until fully paid or further order of the Director.

The Board adopts the remaining orders set forth in the Award of the ALJ that are not inconsistent with the above.

IT IS SO ORDERED.

Dated this ____ day of December 2001.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Timothy G. Riling, Attorney for Claimant
H. Wayne Powers, Jr., Attorney for Respondent and Insurance Carrier
Brad E. Avery, Administrative Law Judge
Philip S. Harness, Workers Compensation Director